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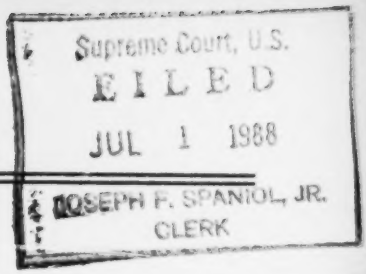

In the Supreme Court of the United States

October Term, 1988

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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SEABOARD SYSTEM RAILROAD, INC.,

Respondent

BRIEF IN OPROSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE CASE

Pursuant to Rule 34 of the Rules of the United States Supreme Court, respondent Seaboard Systems Railroad, Inc. (Seaboard) offers the following facts to the Court in order to correct certain inaccuracies and omissions present in the petition for writ of certiorari of petitioner Stephen R. Thomas (Thomas).

A question at trial concerned the factual incredibility of Thomas' account of his injury. The petition for writ of certiorari omits the fact that, although Thomas' "whole leg turned around" (Transcript, p. 200), Thomas did not yell or make any noise when he allegedly fell. (Tr., p. 239.) Although the caboose contained some noise, the interior was

sufficiently quiet that both men could hear the crackle of the wall-mounted radio and could converse. (Tr., pp. 41-42, 234.) However, Peckinpaugh, who sat within a few feet of Thomas and saw him stand and sit, noticed nothing untoward until, approximately five minutes after Thomas sat down, he asked Peckinpaugh to examine his foot. (Tr., p.64.)

Another question at trial regarded whether Seaboard properly inspected the caboose in which Thomas rode. Thomas' petition for writ of certiorari states that "Hart, a car inspector, indicated that there was not enough employees at the Brewer Yard to inspect cabooses...." (Tr., p. 160, Petition for Writ of Certiorari, p. 14.) However, Hart, a union

official from Evansville, Indiana (Tr., p. 153), was attempting to testify about practices in Danville, Illinois. (Tr., p. 166.) Also, Hart admitted that he could not state that Seaboard had not properly inspected and maintained the caboose in which Thomas rode. (Tr., p. 171.)

Another question arose concerning the wisdom of the configuration of the drainage pipes in the caboose. At trial, Thomas relied upon one Spicer to show that the configuration was faulty. (Tr., p. 88.) In his petition for writ of certiorari Thomas refers to Spicer as "a plumber who was familiar with the condition and pipe layout of the caboose." (Petition, p. 15.) However, as Thomas stated in his petition for appeal to the Virginia

Supreme Court, "Spicer had not done any plumbing work on railroad cars or cabooses." (Petition for Appeal, p. 10.)

Thomas correctly states in his petition for writ of certiorari that the trial judge denied Thomas' proffered instructions regarding negligence and contributory negligence. However, the petition for writ of certiorari omits to mention that during the giving of instructions to the jury, Thomas did not object to the judge's submission of the issues of negligence, causation, and contributory negligence to the jury. (Tr., pp. 312-319.) Furthermore, until the post-trial hearing on Thomas' motion to set aside the verdict, Thomas never

claimed that he established causation as a matter of law. (Id.)

SUMMARY OF THE ARGUMENT

The Court has already decided the questions Thomas presents for review. Thomas' Questions Presented request the Court to proclaim the evidentiary standard for directing a verdict in a Federal Employers' Liability Act (FELA) case. Thomas attempts to distinguish previous cases on the ground that his case presents the question in a new procedural posture. However, the distinction is specious: the Court's pronouncements regarding a decision to grant a directed verdict apply equally to a decision not to grant a directed verdict.

Thomas has waived his right to seek appellate review of the trial

judge's refusal to grant a directed verdict. At trial, Thomas failed to object to the trial judge's refusal to accept Thomas' proffered Instructions 1-A and 3-A. Thomas' omission violates § 8.01-334 of the Virginia Code (1950) and Virginia Supreme Court Rule 5:25, which is similar to Rule 51 of the Federal Rules of Civil Procedure. Furthermore, he has not claimed that his case meets any exception to the rules. Therefore, Thomas, rather than Seaboard, should bear the cost of Thomas' non-compliance with the rules.

Lastly, in this case the Virginia courts ruled in a manner consistent with Federal practice. The Federal courts have consistently stated that a trial court should hesitate to direct a verdict in an FELA case.

Furthermore, Thomas acquiessed in the giving of Instruction 4, which submitted to the jury the issues of negligence, causation, and contributory negligence.

Seaboard's evidence of Thomas' contributory negligence for failing to use his lantern to look for signs of wetness prior to stepping forward sufficed to support an instruction on the issue of contributory negligence. By addressing to the jury the question of causation in Thomas' proffered Instruction 1-A, Thomas conceded the propriety of the submission of the question to the jury. Regarding, negligence, Seaboard presented evidence that no better configuration of drainage pipes could be had, that employees (including Thomas) knew of the need

for increased caution in the cabooses during cold weather, and that Thomas failed to show that Seaboard improperly maintained and inspected the caboose in which Thomas injured himself. From such evidence, a jury reasonably could conclude that Seaboard was not negligent. Therefore, the trial court properly allowed the jury to resolve the issues in Thomas' case.

ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS ANSWERED THE QUESTIONS THOMAS SUBMITS FOR REVIEW.

Thomas' petition for writ of certiorari requests the Court to decide whether a plaintiff is entitled to a directed verdict on the issues of negligence, causation, and contributory negligence in a Federal Employers' Liability Act (FELA) case when it is

said that reasonable fact-finders could only resolve the issues in the plaintiff's favor. (Petition, p. 1.) Thomas admits that the Court has answered his question where a petitioner claims that the trial judge erred in directing a verdict for the defendant under the FELA. (Petition, p. 17). Thomas attempts to distinguish his case on the ground that his case presents the question in the context of a trial judge's decision not to direct a verdict. (Petition for Certiorari, pp. 17, 19.)

However, the Court's pronouncements on this point apply with equal force to a judge's refusal to direct a jury's verdict on an issue. For example, in Wilkerson v. McCarthy, 336 U.S. 53 (1949), the Court reviewed a

trial judge's decision to direct a verdict but stated that "peremptory instructions should not be given 'where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences.'" 336 U.S. at 62 (quoting Washington & Georgetown R.R. v. McDade, 135 U.S. 554, 572 (1890)). Similarly, in Tiller v. Atlantic Coast R.R., 318 U.S. 54 (1943), the Court reviewed a trial court's decision to direct a verdict and, also quoting McDade, stated that "'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury." Tiller, 318

U.S. at 68 (quoting McDade, 135 U.S. at 572).

Thomas does not offer arguments in support of his Questions Presented. Rather, his arguments bear solely upon the sufficiency of the evidence of negligence, causation, and contributory negligence. The Rules of the Supreme Court state that "[t]he petition for writ of certiorari shall contain...[t]he questions presented for review. ... Only the questions set forth in the petition or fairly included therein will be considered by the court." Sup. Ct. R.21.1(a). The rules of the Court also require "a direct and concise argument amplifying the reasons relied on for the allowance of the writ." Sup. Ct. R. 21.1 (j). A petitioner should not receive

a writ of certiorari based solely upon factual arguments when his petition only expressly presents questions of law.

II. THOMAS HAS WAIVED HIS RIGHT TO SEEK APPELLATE REVIEW OF THE TRIAL COURT'S REFUSAL TO DIRECT A VERDICT IN HIS FAVOR ON THE ISSUES OF CAUSATION, NEGLIGENCE, AND CONTRIBUTORY NEGLIGENCE.

At trial, Thomas did not move for a directed verdict on any issue until the conference on the instructions, at which he asked the court for instructions that Seaboard was negligent as a matter of law and that Thomas was not contributorily negligent as a matter of law. Thomas did not object when the court refused to issue the instructions. (Tr., pp. 312-313). Even so, Thomas' requested instruction regarding negligence as a matter of

law explicity provided that the jury would determine the question of causation. Only at the post-trial hearing did Thomas advance the theory that the judge should have directed a verdict on the issue of causation in Thomas' favor.

Virginia Supreme Court Rule 5:25 and § 8.01-334 of the Virginia Code (1950) provide that a party who objects to a trial judge's ruling must state the objection with reasonable certainty at the time of the ruling. The Virginia Supreme Court has stated that Rule 5:25 and its predecessors enable trial judges to rule intelligently and avoid unnecessary appeals, reversals, and mistrials. Woodson v. Com., 211 Va. 285, 288, 176 S.E.2d 818, 820 (1970), cert. denied, 401

U.S. 959 (1971). Virginia adopted the rule "not to obstruct petitioners...but to make more certain the attainment of the ends of justice." Kercher's Adm'r v. Richmond, Fredericksburg & Potomac R.R., 150 Va. 108, 115, 142 S.E. 393, 395 (1928).

The Virginia Supreme Court applied Rule 5:25 and § 8.01-334 to a party's failure to object to a judge's instruction in Spitzli v. Minson, 231 Va. 12, 341 S.E.2d 170 (1986). In Spitzli the trial judge submitted the issues of contributory negligence and proximate cause to the jury without objection from the appellant. Id. at 17, 341 S.E.2d 170, 173 (1986). At the post-trial hearing after the jury returned a verdict unfavorable to the appellant, the appellant requested the

judge to set aside the verdict. Id. at 19, 341 S.E.2d 170, 174 (1986). The judge refused, and the appellant appealed the judge's submission of the issues of causation and proximate cause. Id. The Virginia Supreme Court ruled that the appellant's "failure to preserve his objections at the instruction stage constituted a waiver of any contention that the trial court erred in not ruling as a matter of law upon the issues of contributory negligence and proximate cause." Id. at 18, 341 S.E.2d 170, 173 (1986).

In the context of an appeal from a Federal district court's denial of a petition for habeas corpus, the Fourth Circuit has ruled that Rule 5:25 is purely procedural. Whitley v. Bair,

802 F.2d 1487 (4th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 1618, 94 L.Ed.2d 902 (1987). The court stated that "a federal habeas corpus petitioner's failure to comply with the contemporaneous objection requirement embodied in Rule 5:21 [repealed and reinstated as Virginia Rules 5:17 and 5:25] is a legitimate ground for the application of the procedural default doctrine to bar a federal court's consideration of the petitioner's constitutional claims." Id. at 1501 (citing Murray v. Carrier, _____ U.S. _____, 106 S.Ct. 2639, 2665-2667, 91 L.Ed.2d 397, 413-414 (1986)). The Supreme Court has ruled that it will respect purely procedural state rules. The Supreme Court recognized in Henry v. Mississippi, 379

U.S. 443 (1965), and Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978), that a state has a legitimate interest in preventing parties from needlessly voiding lengthy trials on appeal and that, therefore, a purely procedural state timely objection rule constitutes an adequate and independent state ground for refusing federal review of a state court decision. Henry, 379 U.S. at 447, Tyler, 436 U.S. at 512 n.7.

Seaboard relied upon Rule 5:25 in its arguments to the trial court and the Virginia Supreme Court that Thomas waived any objection to the trial court's instructions by failing to object timely to the trial judge's refusal to grant Thomas' proffered instructions directing the jury's

verdict. Therefore, Thomas' failure to preserve the record should be construed against him, and he should be estopped from seeking federal review of the trial judge's instructions to the jury.

In the context of objections to instructions, Rule 5:25 as applied is equivalent to Rule 51 of the Federal Rules of Civil Procedure, which provides in pertinent part that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." F.R. Civ. P. 51. In Palmer v. Hoffman, 318 U.S. 109 (1943), the Court declared the

rationale for the Federal timely objection rule and the specificity requirement when the Court stated that even "[w]here a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." Id. at 119.

The Federal courts have recognized two exceptions to the Federal rule regarding procedural defaults, but the Court should not employ the exceptions in the present case. In Beardshall v. Minuteman Press Intern., Inc., 664 F.2d 23 (3rd Cir. 1981), the Third Circuit ruled that an appellate court may reverse a verdict on the ground of plain error in a jury charge

in order to prevent a miscarriage of justice. However, Thomas has neither invoked this exception nor argued that the trial court's ruling prejudiced his case in any way. The Supreme Court has stated that the "plain error" standard of review does not bind the Court in cases involving important and novel substantive issues. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256-257 (1981). As shown earlier, though, the Court has already decided the issues which Thomas presents for the Court's consideration. See infra., p.3. Therefore, the present case can hardly be said to present novel issues.

III. IN THIS CASE THE VIRGINIA COURTS RULED IN A MANNER CONSISTENT WITH FEDERAL PRACTICE.

Thomas requests the Court to grant certiorari in his case because "the Circuit Court of Portsmouth and the Supreme Court of Virginia have not followed the standard for the review of evidence as set down by this Court and other Federal Court decisions interpreting the Federal Employers' Liability Act." (Petition, p. 21.) Thomas cites cases which he claims support his argument that the trial court incorrectly declined to remove the question of contributory negligence from the jury. Thomas presents no argument to the Court regarding the submission of the issue of causation to the jury. Thomas does argue that the trial court erred regarding the question of negligence, but he cites

no cases in support of the proposition.

The Federal courts have consistently stated that a trial court should hesitate to give directed verdicts in favor of either party in an FELA case. In Borough v. Duluth, Missabe & Iron Range Ry., 762 F.2d 66 (8th Cir. 1985), the Eighth Circuit Court of Appeals noted that:

> [t]he [trial] court held the railroad was negligent as matter of law. We think that this kind of ruling should be reserved for only the exceptional case. In weighing a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the party moved against, even though contrary inferences might reasonably be drawn....It is true in the present case that the railroad did not attempt to put on any evidence concerning its own negligence. However, a reasonable argument might be made.....

Id. at 68 n.1.

In Dixon v. Penn Central Co., 481 F.2d 833 (6th Cir. 1973), the Sixth Circuit stated, in the context of appellate review of the propriety of submission of a question of contributory negligence to the jury, that "an appellate court should be reluctant to conclude from afar that the trial judge on the scene erred in a factual determination." Id. at 837.

(a) Contributory Negligence

Thomas contends that the trial court in his case did not comply with the Federal standard when it refused to direct a verdict in his favor on the issue of contributory negligence. Seaboard does not deny that the appellate courts properly resolved the cases which Thomas cites regarding

contributory negligence. However, the important factual distinctions which exist between the cases which Thomas cites and the present case tend to show that the trial court in Thomas' case properly allowed the jury to determine the question of contributory negligence.

Thomas cites Borough for the proposition that "if there was no evidence from which the jury could find, [sic] lack of due care by an employee, it is generally fundamental error for the Court to give a contributory negligence instruction." (Petition, p.25.) However, in Borough the defendant based its claim of contributory negligence solely upon the incredibility of the plaintiff's testimony. 762 F.2d at 69. The defendant's only

evidence addressed the plaintiff's medical treatment and damages. Id.

Thomas also relies upon Dixon to show that a defendant may not reach the jury on the issue of contributory negligence merely by asserting that the plaintiff's testimony is incredible. In Dixon the plaintiff operated mechanical levers in a railroad control tower. 481 F.2d at 834. During efforts to repair a switch controlled by one of the levers, the plaintiff injured himself by pushing the lever, which sprang back and injured the plaintiff's back. Id. The defendant failed to argue that a less-hazardous procedure for repairing the switch existed. Id. at 836. The court found that the apparent risk to the plaintiff from attempting to move the lever

was very slight and that the need to repair the switch controlled by the lever outweighed the risk. Id.

Thomas cites Wilson v. Burlington Northern, Inc., 670 F.2d 780 (8th Cir. 1982), cert. denied, 457 U.S. 1128 (1982), for the proposition that an employee's failure to utilize a disused piece of equipment does not constitute contributory negligence (Thomas argued at trial that the lanterns were no longer used inside railroad cars.) In Wilson the plaintiff injured himself while helping to lift a large pan in order to attach it to a hopper car. Id. at 781. Until one year prior to the plaintiff's injury, employees used a jack to lift such heavy equipment. Id. However, the plaintiff "was of the understanding

that the jack could not be used to install the pan [on the hopper]...." Id. The court found that, because the co-workers were prepared to lift the pan manually and several railroad cars would have had to be moved in order to use the jack, "in this situation, [plaintiff] could not reasonably have been expected to decline to carry the pan and to ask that the jack be used instead." Id. at 783. The court ruled that "[u]nder the circumstances present here, [the plaintiff's] decision to help carry the pan was not a matter of free choice nor was it in any way unreasonable." Id.

Lastly, Thomas cites Morran v. Pa. R.R., 321 F.2d 402 (3rd Cir. 1963), and Paluch v. Erie Lackawanna R.R., 387 F.2d 996 (3rd Cir. 1968),

for the proposition that the failure to look for danger when no reason exists to apprehend danger does not constitute contributory negligence. In Morran a wooden walkway, with a rotten underside not visible to the plaintiff, collapsed and caused the plaintiff to fall. Morran, 321 F.2d at 403. In Paluch a rotten wooden telegraph pole, which the plaintiff had climbed pursuant to orders, collapsed under the plaintiff's weight. Paluch, 387 F.2d at 998. The plaintiff in Paluch "was totally inexperienced in the work he was instructed to undertake" and lacked familiarity with the pole's condition. Id. at 999.

Several facts distinguish Thomas' case from all of the decisions cited by Thomas in his petition for writ of

certiorari. The evidence showed that Thomas had worked for Seaboard since 1973 (Tr., p. 208) and that employees commonly knew of the tendencies of drainage pipes in cabooses to "back up" during freezing weather. (Tr., pp. 55, 69-70, 137, 142, 161-162). In spite of the potential presence of water on the floor, Thomas chose not to use his lantern to check for signs of wetness prior to stepping toward the radio. (Tr., p. 234).

Using the lantern would have required neither extraordinary machinations nor permission from Peckinpaugh or Thomas' superiors. Also, contrary to the assertion that the lanterns were no longer used inside cabooses, Thomas testified that he used his lantern inside the caboose

when he first boarded (Tr., p. 251), and Peckinpaugh testified that he used a lantern inside the caboose to examine Thomas' foot. (Tr., p. 44). Finally, because the men each had walky-talkies with which to communicate to the engineer (Tr., page 229), no great need to increase the wall-mounted radio's volume existed.

The foregoing facts support a finding of contributory negligence. Thomas, an experienced employee, knew of facts sufficient to cause him to apprehend danger. The danger was reasonably discoverable because the water lay on the floor's surface. The risk of injury exceeded the need for increased radio-volume, and Thomas could have avoided the risk merely by turning on the lantern at his side.

Therefore, the trial judge properly submitted to the jury the question of Thomas' contributory negligence.

(b) Causation

Thomas presents but does not address the question of causation in his petition for writ of certiorari. However, Thomas should not be able to question the court's submission of the issue to the jury. A portion of Instruction 1-A, which Thomas prepared, conceded that the question of causation was for the jury to resolve: "[i]f you believe...that... [Seaboard's] negligence...caused or contributed in whole or in part, even the slightest, to cause [Thomas'] injury..., then you shall return your verdict in favor of [Thomas]...." Because Thomas' position is that the

trial court should have granted Instruction 1-A (See Petition, pp. 8, iv, v, vi.), Thomas cannot deny that the trial court properly allowed the jury to determine the question of causation.

(c) Negligence

Seaboard concedes that Thomas' evidence sufficed to support a finding by the jury that Seaboard was negligent. However, the evidence did not compel the jury's decision in this regard. In such cases, the Federal courts have consistently stated that a trial judge should allow the jury to determine the question. See infra pp. 25-26, quoting Borough and quoting Dixon.)

Thomas presented evidence that Seaboard and its employees knew that

cabooses had a tendency to accumulate water on their floors during freezing weather. (Tr. pp. 55, 69-70, 137, 142, 161-62). However, Hart, Thomas' only witness that offered an opinion regarding Seaboard's maintenance practices, could not state that Seaboard failed properly to inspect and maintain the caboose in which Thomas rode on the date of his injury. (Tr., pp. 170-171). Furthermore, Seaboard argued that no safer type of drainpipe could be employed in the caboose. (Tr., p. 92; Transcript of Closing Argument, p. 7). Construing the evidence in the light most favorable to Seaboard, the party moved against, one could reasonably infer that Seaboard was not negligent for allowing the condition of the cabooses to persist

when no safer alternative existed and its employees were aware of the potential problems posed by the condition.

Again, Seaboard does not deny that the jury could reasonably have decided that Seaboard was negligent. The jury heard all the evidence and was allowed to make its determination. However, Thomas's evidence was neither uncontested nor so compelling as to direct the jury's verdict. The Court should respect the jury's decision.

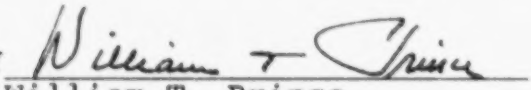
CONCLUSION

For the reasons set forth above, respondent Seaboard Systems Railroad, Inc., respectfully requests the Court to deny petitioner Stephen R. Thomas'

Petition for Writ of Certiorari to the Virginia Supreme Court.

Respectfully submitted,

SEABOARD SYSTEM RAILROAD, INC.

BY 

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CERTIFICATE

I certify that on this 1st day of July, 1988, three copies of the foregoing were mailed, postage prepaid, to:

Raymond H. Strople, Esquire
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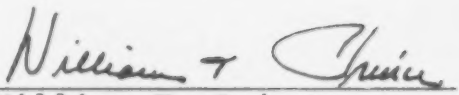
Portsmouth, VA 23705

All parties required to be served have been served.



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